

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 EVERGREEN ISLANDS, et al.,

4 Petitioners,

CASE NO. 00-2-0046c

5 v.

6 SKAGIT COUNTY,

**COMPLIANCE ORDER
LOT AGGREGATION**

7 Respondent,

8 and,

9 AFFILIATED HEALTH SERVICES, et al.,

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12 Intervenor.
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15 **I. SYNOPSIS OF THE DECISION**

16 This matter comes to the Board as a result of a February 6, 2001, Compliance Order in
17 which the Board found that if the County was going to eliminate the lot aggregation
18 provision, it must replace this requirement with other measures that prevent the
19 encroachment of incompatible uses on agricultural lands and their long-term viability.
20 Regulations replacing the lot aggregation provisions also must prevent development which
21 cumulatively requires urban services in rural areas and fails to reduce low-density sprawl.
22 Previous to this order, the Board had found the County's measures for conserving
23 agricultural land compliant when they had included a provision that required the aggregation
24 of contiguous substandard lots under one ownership. When the County repealed this
25 provision, Friends of Skagit County (FOSC), among others, challenged this action. The
26 County readopted the lot aggregation ordinance and committed to retaining it while it
27 developed a replacement measure to comply with the Board's order.
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31 The County has now adopted a measure to replace its lot aggregation requirements that
32 prohibit development of substandard lots in Natural Resource and Rural Lands unless it

1 meets a long list of exemptions. The County argues that some of these exemptions are
2 necessary to comply with the property rights goal of the Growth Management Act (GMA)
3 that requires honoring a property owner's "investment backed expectations." This new
4 regulation also recognizes exemptions that the Board has already found compliant. The
5 County contends that other exemptions for residential and nonresidential uses will not
6 interfere with productive agricultural lands, promote sprawl, or cause the need for urban
7 services.
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10 FOSC argues that the County's new approach to reducing development of substandard lots
11 in Natural Resource Lands (NRLs) and Rural Lands is less effective than the current lot
12 aggregation requirements. Petitioner disputes the County's claims that the investments the
13 County allows are enough to merit an exemption based on property rights, and contends
14 that certain allowed uses on substandard lots interfere with the conservation of NRLs.
15 Petitioner asserts that even if individual exemptions are reasonable, the cumulative effects
16 of all of them add up to interference with the conservation of agricultural land, promote
17 sprawl, and cause the need for urban services.
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20 In this decision, the Board finds that Petitioner has not met its burden of proof that the
21 County's new regulation is less effective than the County's old lot aggregation ordinance for
22 reducing substandard lots in NRLs and Rural Lands for the purpose of conserving
23 agricultural lands, preventing sprawl, and precluding the need for urban services.
24

25 **II. PROCEDURAL HISTORY**

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27 In the February 6, 2001, Final Decision and Order (FDO) in this case, the Board stated that
28 it would not have found Skagit County's (County, Respondent) regulations for protecting
29 agricultural lands of long-term commercial significance from incompatible uses compliant if it
30 had not had a requirement in place that required the aggregation of substandard lots.
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1 The Board's order held:

2 If the aggregation requirement is no longer in place, in order to achieve
3 compliance, the County must adopt other measures that prevent incompatible
4 development and uses from encroaching on resource lands and their long
5 term viability. This includes not only the estimated 4,000 substandard lots
6 within NRL lands, but also those in rural lands near designated NRL lands.

7 Further, the County must ensure by appropriate regulation that in allowing
8 development of substandard lots it does not allow development which
9 cumulatively requires urban services in rural areas and fails to reduce low-
10 density sprawl.

11 *Evergreen Islands, v. Skagit County*, Case No. 00-2-0046c (February 6, 2001)

12 On February 16, 2001, Skagit County filed a motion for reconsideration for: (1) additional
13 time to adopt new development regulations regarding the lot aggregation issue; and (2) to
14 reconsider the ruling that requires development regulations to ensure "that in allowing
15 development of substandard lots [Skagit County] does not allow development which
16 cumulatively requires urban services in rural areas and *fails to reduce low-density sprawl.*"
17 (Emphasis supplied). Skagit County's motion to extend the time frame to 180 days was
18 granted. However, the motion to reconsider the ruling in the Final Decision and Order was
19 denied on March 5, 2001.

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21
22 In October 2001, the Board held a hearing on the lot aggregation issue. During the remand
23 period, the County had appealed the lot aggregation issue to the Skagit County Superior
24 Court. The County had not adopted new lot aggregation measures and argued that, upon
25 more briefing and review, the Board would find the County's current regulations compliant.
26 Friends of Skagit County (FOSC) and the City of Anacortes (Anacortes, City) objected to the
27 County's attempt to reargue the case. These Petitioners argued that this issue was briefed,
28 argued, and decided by the Board, and that it was not appropriate for the County to be
29 arguing for reconsideration at this time. The Board agreed with Petitioners that this was not
30 the appropriate time to reconsider its previous decision and held the County in continuing
31 noncompliance on this issue.
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1 In response to a January 18, 2002, Court Order, the County adopted Ordinance 17523 on
2 January 28, 2002, that, among other actions, restored the lot aggregation provisions of
3 former SCC 14.04.190(5) everywhere in the County. The only difference was that the
4 County was required to research lot ownership history back to July 1, 1990, rather than to
5 March 1, 1965. On February 11, 2002, the Board received Skagit County's Motion for
6 Reconsideration, Request for Stay and to Add to the Record. On the same day, the Board
7 received a motion for reconsideration from FOSC. In response to those motions, on
8 March 27, 2002 the Board issued an order that changed the allowed timelines for achieving
9 compliance on the lot aggregation issue, among others, from 90 to 150 days, as long as the
10 County did not modify its interim ordinance. The County's due date for statement of actions
11 taken was July 1, 2002, and a compliance hearing was scheduled for August 7, 2002.
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15 On June 18, 2002, the Board received from Skagit County a Motion for Order Extending
16 Time for Compliance to November 8, 2002. The Board received no objections to this motion
17 and granted Skagit County's request for extension of the compliance date to November 8,
18 2002.
19

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21 On January 24, 2003, we received from Skagit County a Motion for Order Extending
22 Compliance Report Date to May 9, 2003, to coincide with the extended Superior Court trial
23 date for these matters. The Board received no objections to this motion and granted Skagit
24 County's request for an extension for compliance until May 9, 2003.
25

26 On July 1, 2003, the Board held a compliance hearing and issued a Compliance Order on
27 September 11, 2003, that addressed the lot aggregation issues among others. During the
28 remand period, Skagit County entered into negotiations with Anacortes, FOSC, Evergreen
29 Islands, Gerald Steel, and owners of the Previs/Seavestco property. Negotiations with
30 Previs/Seavestco were successful and that party was dismissed from the case.
31 Negotiations were not successful with Evergreen Islands and FOSC. These Petitioners
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1 repudiated the language to which their attorney Mr. Steel had agreed, dismissed Mr. Steel,
2 and hired new counsel. As a result, the County held a public hearing on two versions of the
3 ordinance; one containing language to which Evergreen Islands and FOSC recently agreed,
4 and one containing language that Mr. Steel had offered, but which Evergreen Islands,
5 FOSC, and some members of the public criticized. The Planning Commission directed staff
6 to come back with a new proposal. The Board recognized that the County had been acting
7 in good faith to settle the lot aggregation issue. The Board found the County in continuing
8 noncompliance and gave the County 180 days to bring itself into compliance.
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11 On March 22, 2004, the County adopted Interim Ordinance 020040006 to address the lot
12 aggregation issue. This ordinance also readopted Interim Ordinance 020030032 that had
13 restored the County's lot aggregation provisions until Interim Ordinance 020040006 was
14 found in compliance with the Growth Management Act (GMA).
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17 The Board held a telephonic compliance hearing on May 11, 2004. Mr. Jay Derr
18 represented the County. Mr. David Bricklin represented FOSC. Mr. Gerald Steel
19 represented Skagit County Growthwatch and himself. Board member Margery Hite recused
20 herself due to her ownership of property in agricultural lands of long-term commercial
21 significance in Skagit County. Board members Holly Gadbaw and Nan Henriksen attended.
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23
24 On June 23, 2004, the Board issued a compliance order that found the County in continuing
25 noncompliance due to the interim nature of the ordinance. The Board did not reach the
26 issues in that decision.
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29 On October 19, 2004, Skagit County adopted Ordinance 020040017 to comply with the
30 Board's June 23, 2004, Final Decision and Order and earlier orders dated February 6, 2001,
31 and September 11, 2003. On January 6, 2005, the Board held a telephonic compliance
32 hearing. Tadas Kisielius represented Skagit County. Don Anderson, Jay Derr,

1 Gary Christiansen, and Carly Ruacho were present for the County. David Bricklin
2 represented FOSC. Ellen Gray was also present for FOSC. Board members Holly Gadbow
3 and Gayle Rothrock attended. At the hearing, the Presiding Officer allowed the following
4 proposed exhibits to supplement the record:

- 5 • Exhibit 1573 – Plat Map from Skagit County’s Assessor’s Office showing division of lots
6 into “P” numbers and associated “primary information screen” for the County’s Telnet
7 System
- 8 • Exhibit 1574 – Resolution 1575 – Interim Zoning Ordinance (April 17, 1973)
- 9 • Exhibit 1575 – Resolution 5985 – Amendment to Interim Zoning Ordinance 4081
10 Minimum Lot Requirements
- 11 • Exhibit 1576 – Skagit County Subdivision Ordinance No. 6411
- 12 • Exhibit 1577 – Skagit County Short Subdivision Ordinance No. 5544 (6/15/71)
- 13 • Exhibit 1578 – Skagit County Right to Farm Ordinance No. 12815 (1/28/91)
- 14 • Exhibit 1579 – Order Striking Trial Date and Modifying Second Stipulation and Agreed
15 Order Re: Continuance of Trial Date (4/18/2003)
- 16 • Exhibit 1580 – Resolution No. 6235 Amendment to Interim Zoning Ordinance 4081
17 (1/22/74)
- 18 • Exhibit 1581 – Declaration of Carly Ruacho (12/13/04)
- 19 • Exhibit 1582 – Declaration of Tom Karsh (12/13/04)
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24 **III. STANDARD OF REVIEW, PRESUMPTION OF VALIDITY,**

25 **BURDEN OF PROOF**

26 Ordinances and Resolutions adopted in response to a finding of noncompliance are
27 presumed valid. RCW 36.70A.320.

28
29 The burden is on Petitioners to demonstrate that the action taken by Skagit County is not in
30 compliance with the requirements of the Growth Management Act (GMA, Act). RCW
31 36.70A.320(2).
32

1 Pursuant to RCW 36.70A.320(3), we “shall find compliance unless [we] determine that the
2 action by [Skagit County] is clearly erroneous in view of the entire record before the board
3 and in light of the goals and requirements of [the GMA].” In order to find the County’s action
4 clearly erroneous, we must be “left with the firm and definite conviction that a mistake has
5 been made.” *Department of Ecology v. PUD 1*, 121 Wn.2d 19, 201 (1993).
6

7 8 **IV. ISSUE TO BE DISCUSSED**

9 *If the lot aggregation requirement is no longer in place, has the County achieved*
10 *compliance by adopting other measures that prevent incompatible development and uses*
11 *from encroaching on resource lands and their long-term viability? This includes not only the*
12 *estimated 4,000 substandard lots within natural resource lands (NRL), but also those in rural*
13 *lands near designated NRL lands.*
14

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16 *Further, has the County ensured by appropriate regulation that in allowing development of*
17 *substandard lots it does not allow development which cumulatively requires urban services*
18 *in rural areas and fails to reduce low-density sprawl? Evergreen Islands v. Skagit County,*
19 *Case No. 00-2-0046c (February 6, 2001)*
20

21 22 **V. DISCUSSION OF THE ISSUE**

23 **Background**

24 In its February 6, 2001, Final Decision and Order, the Board found that if the County
25 eliminated its lot aggregation ordinance, it needed to replace it with a regulation that was
26 equal or better in preventing incompatible development from encroaching on resource lands
27 and their long-term viability and ensuring that the development of substandard lots does not
28 allow development to occur which cumulatively would require urban services or fail to
29 prevent low density sprawl. The Board also understood that the County’s current lot
30 aggregation ordinance had limited success in preventing incompatible development to
31 encroach on NRLs or low density sprawl. The Board was aware as well that development
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1 was continuing to occur in NRLs and Rural Lands because the lot aggregation ordinance
2 applied only to contiguous lots under the same ownership. The Board's February 6, 2001,
3 order acknowledged that even when the County required lot aggregation, that was often
4 overturned because contiguous lots under one ownership were allowed to develop either
5 through favorable findings in Superior Court that recognized the subdivision law's innocent
6 purchaser provisions or through variances granted by the Hearings Examiner. The Board
7 also acknowledged the County's need to find a more equitable method of reducing the
8 number of substandard lots. The Board said:

10 There is a large body of evidence in the record that the aggregation ordinance,
11 as implemented or the County's failure to implement it, was burdensome and
12 arbitrary to landowners, ineffective in reaching the desired result, and needing
13 to be fixed.

14 We agree with the County and Intervenors' argument that development should
15 be triggered and governed by ascertainable criteria, consistent with public
16 health considerations, not by blind adherence to arbitrary dates and ownership
17 patterns. We are aware of the AG's opinion that the GMA does not require
18 aggregation.

19 FDO (February 6, 2001) at 9.

20 Nevertheless, when the County repealed its lot aggregation ordinance, the Board found the
21 County needed to ensure that its regulations for conserving agricultural lands and
22 preventing sprawl were at least as effective as the regulations that the Board had found
23 compliant that had included requiring aggregation of contiguous substandard lots under one
24 ownership.

26 **Number of Substandard Lots**

27 FOSC cites several studies and a map¹ that it argues establishes that a large number of
28 substandard lots exist, the development of these substandard lots interferes with the
29 conservation of resource lands and promotes sprawl, and that development of these lots is
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32 ¹ The County's GIS study (Exhibit 1552) and COMMEd study and map (Exhibit 1448, Attachment C)

1 occurring at a rate that continues to threaten the conservation of agricultural lands and
2 increase sprawl. Friends of Skagit County's Response to Skagit County's Actions Taken To
3 Comply Regarding Lot Aggregation (November 11, 2004) (FOSC Response) at 4 -7. The
4 County contends that these studies could overestimate the number of substandard lots
5 because all parcels are not necessarily lots, and several parcels sometimes make up one
6 lot. The County also maintains that while the studies show that development is being
7 permitted on NRLs and Rural Lands, it does not show that the development being permitted
8 is development that necessarily interferes with productive resource lands or promotes
9 sprawl. Moreover, the County maintains that none of the studies measure the effectiveness
10 of the measures adopted by Ordinance No. 020040017 (the Ordinance). Skagit County's
11 Responding Brief (December 13, 2004) (SCRB) at 4–11.
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14
15 The Board's February 6, 2001, order accepted the estimate of 4,000 substandard lots
16 existing in Natural Resource Lands (NRLs). The Board said:

17 This includes not only the estimated 4,000 substandard lots within NRL lands, but
18 also those in rural lands near designated NRL lands.
19 Final Decision and Order (February 6, 2001) at 9.

20 The Board agreed with FOSC that the large number of substandard lots in NRL lands
21 threatened to interfere with the conservation of NRL lands and could promote sprawl, and
22 that the County's land use regulations needed to have a mechanism to help reduce these
23 substandard lots.
24

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26 *Conclusion:* While the Board agrees with Petitioner that the studies cited by FOSC
27 establish the problem, the Board also agrees with the County that the studies do not
28 measure the success or failure of the Ordinance.
29

30 **General Arguments**

31 The County's new approach to the reduction of legally platted substandard lots is prohibiting
32 their development unless they meet the criteria for certain exemptions that would allow for

1 development. These exemptions that allow for the development are based on investments
2 in the lot made by property owners, prior rulings of the Board, or the County's determination
3 that the use does not interfere with the conservation of NRLs or promote sprawl. While the
4 Petitioner does not object to all the County's exemptions, it argues that many of the
5 exemptions are not necessary or required and the cumulative effect of the large number of
6 exemptions will interfere with the conservation of NRLs and will promote low-density sprawl
7 and need for urban services.
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10 The County argues that these exemptions need to be viewed in the context of the County's
11 overall designation and conservation measures for agricultural resource lands, sprawl
12 prevention requirements and environmental protections. The measures that the County
13 cites for conserving NRLs are the following: requiring large minimum lot sizes (currently and
14 long before the Growth Management Act (GMA) was enacted), a Right to Manage Resource
15 Lands provisions (SCC 14.38), disclosure on deeds by landowners selling land within a mile
16 of agricultural lands of their proximity to agricultural resource lands, and 200-foot setbacks
17 for lands adjacent to NRLs. Other than the minimum lot size, these conservation measures
18 would apply to all NRLs and Rural Lands adjacent to NRLS. SCRB at 1–3. Exhibits 1575,
19 632, 1578, 1085.
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22
23 The County also states that while all lots of record can be conveyed, not all lots of record
24 are eligible for development. The County says that for a lot to be developable, it must be
25 certified as a lot of record, meet the minimum lot size or one of the exemptions, and must
26 meet all the county's code requirements for concurrency (SCC 14.28), flood damage
27 prevention (SCC 14.34), drinking water systems (SCC 12.48), on-site sewage (SCC 12.05),
28 shorelines protections (SCC 14.26), and critical areas regulations (SCC14.24). *Ibid* at 17
29 and 18.
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1 The County emphasizes, as it has in previous briefs and arguments in this case, that the
2 record in this case shows the lot aggregation ordinance is not working, for the reasons
3 discussed above. The County also references a letter from Skagitonians to Preserve
4 Farmland to support its argument that the lot aggregation requirement deters farmers from
5 acquiring adjacent lots as purchase of an adjacent lot would cause that lot to lose its
6 development right. Exhibit 1448 at 2 and 3. The County contends this result works against
7 farmers acquiring adjacent lots for agricultural use and does not prevent development of the
8 lot when that lot could be purchased by a buyer that does not own contiguous property and
9 then be developed. *Ibid* at 15.
10

11
12 The County cites two Attorney General Opinions and the property rights goal of the GMA to
13 support their arguments for why the exemptions in the ordinance are necessary. The County
14 maintains one opinion emphasizes that lot aggregation is not required. Appendix B.
15 Another Attorney General's opinion was written to advise counties and cities on how to
16 avoid takings on private property when formulating their GMA development regulations and
17 advises them that one way to do this is to consider property owners "investment backed
18 expectations." Exhibit 1553. The County stresses that considering these investment
19 expectations are legitimate reasons to include the exemptions to the prohibition of
20 development of substandard lots. SCRB at 23 and 24.
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22

23 **Non contested Exemptions**

24 The County declares that any of the Ordinance's provisions that were not contested by
25 FOSC should be found in compliance. SCRB at 23. The County cites the following
26 provisions as uncontested: SCC 14.16.850(4)(b) (testamentary provisions); SCC
27 14.16.850(4)(c)(ii) (Edison Subarea); SCC 14.850(4)(c)(iii) (Adopted LAMIRD); SCC 14.16.
28 850(4)(c)(viii)(A) (Rural Village Residential and Rural Intermediate); and SCC
29 14.16.850(4)(c)(v) (Urban Growth Area). Therefore, the County argues that these sections
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1 should be found in compliance according to *Achen v. Clark County*, Case No. 95-2-0067
2 (Compliance Order, November 16, 2001 [sic]).
3

4 We agree. Petitioner has not contested the adoption of these provisions exempting
5 substandard lots that meet these criteria from being developed. In the past decisions, the
6 Board has said:
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8 Under RCW 36.70A.320(3), a hearings board “shall find compliance unless it
9 determines that the action ... is clearly erroneous in view of the entire record before
10 the board and in light of the goals and requirements of [the GMA].”
11 *Achen et al v. Clark County*, Case No. 95-2-0067 (Compliance Order, November 16,
12 2000).

13 *Conclusion:* Therefore, without any evidence in the record to the contrary, the
14 aforementioned uncontested provisions of this ordinance are found to be in compliance with
15 the GMA pursuant to RCW 36.70A. 320(3).
16

17 **Contested Exemptions**

18 The Board will next evaluate the arguments for and against certain exemptions that allow for
19 development on substandard lots that Petitioner alleges are not necessary and the County’s
20 response.
21

22 A. Exemptions Based On Investment-Backed Expectations. SCC 14.16.850 (4)(c)(i),
23 (vi)(A)(B)(C), and (vii)(B)(C)

24 The Petitioner contends the following exemptions allow for the development of too many
25 substandard lots and the investments that lot owners have made are not significant enough
26 “investment-backed expectations” to merit an exemption:
27

- 28 • All lots created after 1965 because the state subdivision law did not require a
29 sufficient investment of the applicant.
- 30 • One-acre or larger lots where owners have approved water or sewer connections,
31 participated in limited improvement districts, obtained septic system approvals, or
32 drilled wells because the County requirements do not constitute a significant

1 investment, as the Health Officer, rather than a certified engineer could complete the
2 requirements for an applicant.

- 3 • Lots of less than one acre that have a septic system installed or have been approved
4 for water service. FOSC Response at 7-14.

5 The County argues that the investments made by owners of substandard lots are significant
6 and in line with the Attorney General's advice on how to avoid takings and consistent with
7 the property rights goal of the Act. In regard to the exemption for all lots platted after 1965,
8 the County declares that this exemption is not a new provision and that it has always been
9 part of the County's approach to lot aggregation and conserving agricultural lands since lot
10 aggregation was instituted. Also, at least in agricultural lands, the County points out it has
11 had a large minimum lot size of 40 acres since 1979, and a 30-acre minimum lot size from
12 1973 that decreased the potential for substandard lots that interfere with agricultural uses.
13 Exhibits 1575 and 632. The County also asserts that the 1965 state subdivision law did not
14 differ significantly from the subdivision law today and both require significant investments by
15 property owners for subdivision approval. Appendix D. SCRB at 27 and 28.
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19 As for exemptions for substandard lots that have a water or sewer connection, they must
20 have a binding contract for a connection, or have, or are paying, a Limited Improvement
21 District (LID) or Utility Local Improvement District (ULID) assessment. The County argues
22 that this exemption recognizes that these investments are precursors to residential
23 development and honors the principle that the development will follow when the landowner
24 has invested in or assumed an enforceable obligation to pay for utilities. To receive an
25 exemption for having made an investment in a septic system, the owner must have installed
26 the system or have a permit. According to the County code, this entails requiring a designer
27 or installer who meets certain minimum qualifications to record soil, topography, and
28 groundwater conditions, among other data, and use specified procedures to certify the soil
29 before a septic system can be installed or a permit issued. SCC 12.05.190. The County
30 includes a declaration from a manager who has served in various capacities in the County's
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1 Planning and Permit Center that the County does not perform these tasks for an applicant.
2 Exhibit 1582. To obtain an exemption for having made investments in water, the County
3 Code requires a well log: the record of construction of a well on the lot. A well log from
4 someone else's lot cannot be used, as Petitioner alleges. The County also argues that LIDs
5 and ULIDs are contracts that are binding on owners for the life of the LID or ULIDs and that
6 water or sewer system purveyors make investments and sell bonds based on these
7 commitments and therefore must be recognized as substantial investments. SCRB at
8 30-34.
9

10
11 *Conclusion:* The exemption that allows for development of all lots platted after 1965 has
12 been part of the County's lot aggregation ordinance since it was established. The Board did
13 not find this provision noncompliant when it found the County's agricultural conservation
14 measures compliant and when it allowed the County to apply its current lot aggregation
15 ordinance while it worked on a replacement measure. Exhibits 1085 and 1034. (Ordinance
16 20030001 at 14.04.190(5)). Therefore, because this exemption has been part of the
17 County's natural resource conservation approach since these measures have been under
18 Board review and the Board has not found this exemption noncompliant, we do not find it
19 noncompliant now. Furthermore, the subdivision requirements required by the state in 1965
20 required a similar kind of investment to that which is required by today's subdivision law,
21 which is extensive. Appendix D. **We find that it is reasonable and consistent with past**
22 **Board decisions, the Attorney General's advice, and RCW 36.70A.020(6) for the**
23 **County to continue the exemption for lots platted after 1965.**
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27 Our review of the County's code and the declaration shows the County has accurately
28 portrayed that the investments to obtain a septic permit or be approved for a water
29 connection are more substantial than Petitioner alleges. Exhibit 1582. LIDs and ULIDs are
30 contracts that have binding financial obligations on the participants. Petitioner argues that
31 the County has set no threshold for what constitutes a significant investment, that it is
32

1 reasonable for a property owner to expect development be allowed. Petitioner has also not
2 suggested a threshold. RCW 36.70A 320(2) places the burden of proof on the petitioner.
3 **For the exemptions allowed by SCC 14.16.850 (4)(c)(i), vi(A)(B)(C), and vii(B)(C), we**
4 **find that the Petitioner has not met the burden of proof that the County should not**
5 **allow these exemptions pursuant to RCW 36.70A.320(2).**
6

7
8 B. Exemption Based on Vested Permits. SCC 14.16.850 (4)(d)(vii)(D)

9 Petitioner contends that this exemption allows for any use allowed by zoning in place when
10 the permit vested without regard to the proposed use for which the permit was issued. They
11 further contend this provision promotes sprawl. FOSC Response at 14 and 15.
12

13 The County states that the exemption for vested uses recognizes and implements the
14 County's vesting provisions that have been upheld by a previous Board decision in this
15 case. FDO (February 6, 2001). The County contends that the FOSC mischaracterizes the
16 exemption when it says it pertains to any use allowed by the zoning. Respondent says that
17 the Skagit County code is explicit that vested uses are only for those uses based on the
18 level of detail that were provided in the original application. SCRB at 35-36.
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21 *Conclusion:* We find that the County accurately describes its code and the vested uses are
22 based on the uses detailed in the vested permit application. See SCC 14.02.050.
23

24 Furthermore, the February 6, 2001, order shows that the Board has found the County's
25 vesting provision in compliance. In that order the Board said:

26 Even though we are concerned about the possible future impact of the
27 County's vesting ordinance, we find that the ordinance does reflect current
28 Appellate Court decisions and therefore was within the range of choices
29 available to the County under GMA.
30 FDO (February 6, 2001) at 18.
31
32

1 **Because this provision has already been found to be compliant by the Board, and has**
2 **not changed, Petitioner has not met its burden of proving that this provision should**
3 **not be included in the ordinance's exemptions.**
4

5
6 C. Exemption Allowing Remodel of an Existing Structure. SCC 14.16.850(c)(vii)(A)

7 Petitioner alleges that this provision allows for another residential use on the lot where there
8 is an existing residential structure. Petitioner contends allowing this makes no sense and
9 interferes with conservation of agricultural lands and promotes sprawl. FOSC Response at
10 14.
11

12 The County counters that this provision does not allow for a second residence on an
13 existing lot. The County argues that without this provision existing residential and
14 commercial uses on substandard lots would be nonconforming, and their remodel would be
15 precluded. The County argues that the remodel of these existing uses does not interfere
16 with agricultural land conservation or promote sprawl. SCRB at 34 and 35.
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19 *Conclusion:* The Board has no reason to doubt the County's explanation of this code
20 provision and agrees that the remodel of these existing uses does not interfere with
21 agricultural land conservation or promote sprawl.
22
23

24 D. Exemption Allowing for Development of Five-Acre Lots in Rural Reserve Designations.

25 SCC 14.16.850 (4)(c)(viii)(B)

26 FOSC contends that permitting five-acre lots in the Rural Reserve without Conservation and
27 Reserve Developments' (CaRd) protections for buffers and clustering will undermine the
28 requirement for a variety of rural densities and not protect rural character. FOSC Response
29 at 15. The County maintains that a five-acre lot is not inherently inconsistent with the GMA
30 and that the County has regulations in place that conserve NRLs. SCRB at 36 – 38.
31
32

1 *Conclusion:* The Board has already found that the County's regulations for rural lands
2 provide for a variety of rural densities. SCC 14.16.300 – 14.16.370. The County also has
3 regulations in place that provide for 200-foot buffers for development adjacent to agricultural
4 resource lands. **Therefore, the Board finds that the County's current overall zoning**
5 **structure for Rural Lands and its agricultural land conservation measures will help**
6 **prevent these five-acre lots in Rural Reserve districts from undermining rural**
7 **character and interfering with the conservation of NRLs.**
8

9
10 E. Exemption Allowing for Development of 10-acre lots in Rural Resource Zones. SCC
11 14.850 (4)(c)(viii)(C)

12 FOSC acknowledges that the County has eliminated exemptions to develop 10-acre lots in
13 NRLS and for lots enrolled in an open space tax reduction programs. Nevertheless,
14 Petitioner asserts that allowing a residence on a 10-acre lot in Rural Resource Zones
15 interferes with the conservation of Natural Resource Lands and providing these lots an
16 exemption adds to the substandard lots that qualify for an exemption in these designations.
17 FOSC argues that the County should have de-designated these parcels if they were going
18 to allow for residential use on this size of lot, rather than including them in the agricultural
19 land designation. FOSC Response at 16-17.
20
21

22
23 The County argues that Petitioner has not shown how residential development on 10-acre
24 lots in Rural Agricultural (RRC-NRL) and Secondary Forest (SF-NRL) lands interferes with
25 conservation of these rural Agricultural and Forest Lands. Additionally, the County points
26 out that when it designated the resource lands, it intentionally used a broad brush to keep
27 the zoning boundaries uniform to avoid pockmarked or irregular boundaries and to prevent
28 pockets of incompatible development inside or adjacent to these designations. The County
29 asserts that this approach better conserves these resource lands than de-designating these
30 lots as Petitioner suggests. SCRB at 38 - 39.
31
32

1 *Conclusion:* The Board has previously found the County's approach to designating these
2 Rural Resource designations compliant with the GMA. Development of these lots will also
3 have to comply with all the other regulations governing development in resource lands.
4 **Petitioner has not offered any evidence to persuade the Board that this exemption**
5 **interferes with the conservation of Rural Resource Lands.**
6

7
8 F. Exemption Allowing Residential Use on Substandard Lots Accessory to a Timber Use in
9 the Industrial Forest Zone. SCC 14.16.850(4)(c)(viii)(D)

10 FOSC states that this exemption, a permitted use already included in the County code,²
11 would be acceptable if the County had an adequate implementation mechanism to ensure
12 that the residential use is secondary to forestry. However, Petitioner argues that the County
13 does not enforce this provision by citing Exhibit 1448. FOSC Response at 17 – 18.
14

15
16 The County responds that the enforcement of a development regulation is not a matter for
17 Board review. It contends that the exhibit cited by Petitioner is not an admission of guilt by
18 the County, but an allegation by the Farmland Legacy Program that the County does an
19 inadequate job of ensuring that residences in agricultural land are secondary uses. Exhibit
20 1448, Attachment D. Nevertheless, it offers an explanation of how enforcement of this
21 provision is achieved. Exhibit 1581. SCRB at 39–40.
22

23
24 *Conclusion:* We agree that it is not in our purview to determine whether a code requirement
25 is being enforced. This regulation has not been found noncompliant by the Board. Our
26 review of the record shows that the County has not admitted inadequate enforcement of this
27 provision and has, in fact, provided documentation on how this provision is enforced.
28 Exhibits 1448, Attachment D, and 1581. **Petitioner has not met its burden of proving**
29 **that this exemption interferes with resource land conservation.**
30
31
32

² See SCC 14.16. 410(3 (c).

1
2 G. Exemption Allowing the Development of Certain Non-Residential Uses in Rural
3 Resource Zones. SCC 14.16.850(4(d))

4 FOSC argues that the type and number of nonresidential uses allowed in Agricultural
5 Resource Zones interfere with the conservation of NRLs. Additionally, it argues that this
6 section of the ordinance's confusing language makes it difficult to tell what is being
7 exempted. FOSC Response at 18-20.
8

9
10 The County replies that this section obviously applies to lots that do not meet the size
11 requirements of the zone and applies only to rural residential zoning districts. The County
12 maintains that these uses are of limited intensity, and do not impact the use of resource
13 lands. The County says that some of the uses that Petitioner alleges the County allows,
14 such as churches, kennels, and indoor shooting clubs, have been eliminated from the
15 adopted final version of the ordinance. For the remaining uses, such as trails and
16 cemeteries, the County argues that Petitioner does not show how the allowed uses in these
17 rural residential zones interfere with the conservation of resource lands or promotes sprawl.
18
19 SCRB at 41 and 42.
20

21
22 *Conclusion:* The County has eliminated the most intense nonresidential uses from its Rural
23 Residential Zones in the uses now allowed on substandard lots in these land use
24 designations. The County's conservation measures will apply to those uses adjacent to
25 resource zones. **Petitioner has not persuaded the Board that allowing the remaining**
26 **permitted or conditional uses, which have already been deemed appropriate for these**
27 **zones, on substandard lots will interfere with resource land production or promote**
28 **sprawl.**
29
30
31
32

1 H. Exemption for Allowed Uses Other than Residential Uses in NRLs. SCC14.15.850(4)(e)

2 Petitioner again argues that this provision is confusing and that it is hard to tell what use is
3 being exempted. Petitioner contends that this section purports to prohibit residential uses,
4 but the uses listed are not exclusively residential uses. Petitioner contends that even if
5 residential uses are prohibited in NRLs, allowing the remaining uses in NRLS interfere with
6 their conservation. FOSC Response at 20-22.
7

8
9 The County responds that this section has been carefully crafted to eliminate residential
10 uses. Respondent explains the uses listed as prohibited are uses that are accessory to a
11 residential use. Specifically listing the uses that are not allowed prevents the building of a
12 residence to accommodate the secondary use. The County argues that the remaining uses
13 that this exemption allows on substandard lots have been found to be uses that do not
14 interfere with the conservation of NRLs. SCRB at 42-44.
15

16
17 *Conclusion:* We find the wording of the code consistent with the County's explanation that
18 the elimination of the uses that depend on residences prevents the building of new
19 residences on these substandard lots through the use of this provision. **Petitioner has not**
20 **persuaded us that allowing the remaining uses which were found not to interfere with**
21 **resource land production and will be subject to the County's conservation measures,**
22 **will not interfere with the conservation of resource lands when developed on**
23 **substandard lots.**
24

25
26 I. Reasonable Use Exemption -14.16.850 (4)(f)

27 FOSC argues that while the County requires property owners to meet the criteria described
28 below to qualify for a reasonable use exemption in the Rural Reserve, Rural Village, and
29 Rural Intermediate Zones, it does not require a minimum lot size, or consider lots proximity
30 to other similar lots, unless they are contiguous. This would mean that the smallest
31 substandard lots could be developed. Petitioner argues the cumulative effects would not be
32

1 evaluated because a reasonable use exemption is considered on an individual basis.
2 Petitioner contends that while a single use might not cause the need for urban services,
3 development of many of these lots might create a need for them, and undermine rural
4 character. The Petitioner also states that development of these lots is allowed without
5 evaluating their impact on the conservation of agricultural lands. FOSC Response at 22-23.
6

7
8 The County declares that the inclusion of a reasonable use exemption is consistent with the
9 Attorney General's advice to establish an internal review process to avoid regulatory
10 takings. Respondent emphasizes the reasonable use exemption does not apply to lots that
11 were in common ownership before 1990 that could be aggregated to qualify for
12 development or an exemption to the minimum lot size. Only if lot aggregation fails this
13 requirement, can a reasonable use exemption be considered. Also, in agricultural lands,
14 agricultural use is considered a reasonable use. To answer Petitioner's contention that the
15 County should evaluate the cumulative effects of this exemption, the County responds that
16 the courts review constitutional takings cases on a case by case basis regardless of lot size
17 or proximity to other lots affected by the same regulation. SCRB at 45.
18

19
20 *Conclusion:* We are not persuaded that the smallest lots will be developed, since the
21 County requires its septic code requirements to be enforced and such lots cannot be
22 provided with urban services. The Board recognizes that the County has included other
23 mitigating factors to this exemption, including limiting this exemption to Rural Residential
24 Zones, considering agricultural use as reasonable in agricultural land, enforcing its other
25 code requirements, including buffers for lots adjacent to agricultural lands, and requiring that
26 contiguous lots in common ownership since 1990 must be aggregated to obtain a
27 development permit or qualify for an exemption. The Board has difficulty evaluating
28 Petitioner's claim that development of many of these lots in the same area would cause the
29 need for urban services, undermine rural character, and interfere with the conservation of
30 agricultural lands, without evidence in the record of how many lots are affected by this
31
32

1 exemption, the location of lots affected by this exemption, and the impact on areas of
2 environmental vulnerability or degradation caused by this exemption. **Petitioner has not**
3 **sustained its burden of proof that this exemption will interfere with the conservation**
4 **of resource lands, cause sprawl or the need for urban services, or is not necessary,**
5 **pursuant to RCW 36.70A.020(6).**
6

7 J. Recognizing Previous Lot Certifications, SCC 14.06. 045(5), and Allowing Applications
8 for Multiple Lots in a Subdivision. SCC 14.06.045(7)
9

10 FOSC says this section allows development of previously certified sub-sized lots. Petitioner
11 objects to this section because it adds to the already too-long list of exemptions and without
12 examining the cumulative effects of adding this exemption. FOSC's Response at 23 and
13 24.
14

15 The County says that it decided to honor previous lot certifications and not make property
16 owners repeat the lot certification process to provide predictability and certainty. The
17 County declares that it did an extensive analysis of previously certified undeveloped lots
18 and determined that the total possible impact from these lots was not significant enough to
19 justify reneging on previous lot certifications. SCRB at 45.
20
21

22 In regard to Petitioners objections that allowing property owners to apply for lot certification
23 for multiple lots in a subdivision with a single application, the County replies that this
24 provision only applies to lots that were platted after 1965 that are already exempt and would
25 not have to be aggregated, under the lot aggregation provisions. This provision eliminates
26 multiple applications and development fees, is an efficiency measure for staff and the
27 property owner, and avoids unnecessary duplication in the process. SCRB at 46.
28
29

30 *Conclusion:* The County's study of previous lot certifications shows that there are 499
31 vacant lots in Natural Resource Lands designations and Rural designations. Exhibit 1551.
32 Petitioner does not provide documentation on the location of these lots, whether they are

1 grouped together, or their likelihood of obtaining development permits. According to the
2 provisions being now reviewed, these previous lot certifications are not granted an
3 automatic development right. See SCC 14.06.045(1)(b). Likewise, the provision that
4 allows for lot owners to apply for multiple lot certifications in one application makes lot
5 certification easier and more efficient, but does not guarantee development of these lots.
6 The County in both cases must determine that these are legally platted lots, establish if the
7 lot meets one of the exemptions, and apply all of its development regulations. These
8 contested provisions are administrative processes. While the previous lot certifications
9 show potential for the development of substandard lots in Rural and Resource Lands,
10 Petitioner has not met the burden of proving that these administrative measures in
11 themselves threaten the conservation of Rural and Resource Lands, cause sprawl, or the
12 need for urban services. Furthermore, RCW 36.70A.020(7) provides that once decisions
13 are made at the comprehensive plan and development phase of planning, administrative
14 decisions should be made in an efficient manner.
15
16

17
18 K. Innocent Purchaser Provisions SCC 14.18.000

19 FOSC says that these provisions are not clear. Petitioner contends that if a property owner
20 qualifies as an innocent purchaser, that landowner can convey the property and possibly
21 build on it, even if it was improperly created. Petitioner requests that this be remanded to
22 the County to be written in clear fashion. FOSC Response at 24–25.
23
24

25 The County replies that this provision ensures that innocent purchasers are treated equally
26 with other landowners under the Lot Certification Ordinance. They can convey their lots, but
27 will have to meet the provisions of this ordinance to develop their property.
28

29 Our examination of the code shows that it: a) defines an innocent purchaser, b) requires
30 illegally created lots under the same ownership will need to be combined if they were
31 contiguous at the time of application for innocent purchaser status, c) allows innocent
32

1 purchasers to convey lots, but requires them to meet the County's code requirements for
2 development, and d) prohibits development if the innocent purchaser received lot
3 certification on a property that is not a lot of record. **We find no reason to remand this**
4 **provision to be rewritten.**

6 7 **Cumulative Effects**

8 FOSC argues that even if the Board finds that the exemptions are reasonable in light of
9 property rights considerations and/or if an individual exemption itself might not interfere with
10 the conservation of agricultural lands, cause sprawl, or the need for urban services, that the
11 exemptions are so numerous the cumulative effect of these exemptions will together cause
12 these impacts. Petitioner contends that the cumulative effects of all these exemptions make
13 the measures adopted by Ordinance 020040017 less effective than the current lot
14 aggregation measures. Petitioner maintains that until the County analyzes the cumulative
15 effects of these measures, this ordinance should not be found in compliance. FOSC
16 Response at 7.

18
19 The County contends the burden of proof is on the Petitioner to show the Ordinance's
20 cumulative effects interfere with resource lands, promote sprawl or create the need for
21 urban services and is less effective than the current lot aggregation measures for reducing
22 the number of substandard lots. The County argues that FOSC has not provided any
23 evidence or support to show what these cumulative impacts are. SCRB at 22 and 23.

25
26 *Conclusion:* The Board recognizes the numerous substandard lots in Resource and Rural
27 Lands have the potential to continue to threaten conservation of agricultural lands, promote
28 sprawl, and cause the extension of urban services outside of urban growth areas. The
29 Board also understands that while current lot aggregation measures reduced the number of
30 substandard lots, its success was limited for these reasons:

- Substandard lots that were not in contiguous ownership could be developed. (SCC 14.04.190)
- Farmers were deterred from acquiring adjacent substandard lots for agricultural use , because the land lost a development right when purchased by an adjacent landowner. (Exhibit 1448 at 2 and 3),
- Some contiguous lots under one ownership were allowed to develop either through favorable findings in Superior Court that recognized the subdivision law's innocent purchaser provisions or through variances granted by the Hearings Examiner. (Exhibit 0473)
- It was considered inequitable because it was based on ownership, rather than performance measures. (Exhibit 1453).

In creating a replacement for the current lot aggregation measure, the County must harmonize the goals of the GMA, which in this case are Goals (6) Property Rights and (8) Natural Resource Industry. RCW 36.70A.020 (6) and (8). RCW 36.70A.320(2) requires that the Petitioner also carries the burden of proving that the measures adopted by Ordinance 020040017 are less effective than current lot aggregation measures that the County also had in place when its agricultural conservation measures were found compliant. Petitioner argues the County has not achieved this harmony because too much emphasis is placed on the Property Rights goal in the adopted measures at the expense of Goal 8's direction to maintain and enhance natural resource industries and encourage the conservation of productive forest and agricultural lands and discourage incompatible uses. However, Skagit County contends that in reducing the threat caused by legally platted substandard lots, it is obligated to consider a landowner's property rights which, according to an Attorney General's opinion, expressly written to provide guidance on how to protect property rights in a GMA context, include recognizing a property owner's "investment backed expectations."

1 In the exemptions discussion above, we found that in making its argument Petitioner claims
2 the amount of investment that property owners make towards the development of their
3 property was "not enough" to merit an exemption that allowed for development of the
4 substandard lot. Petitioner did not offer the Board any criteria for evaluating this allegation.
5 Also, in some instances, Petitioner mischaracterized the County's requirements and asked
6 the Board not to allow for exemptions for measures that the Board had already found
7 compliant (vested permits, exemptions for lots platted after 1965). For other exemptions we
8 found Petitioner had not sustained the burden of proving that this exemption would interfere
9 with the conservation of agricultural lands, promote sprawl, or cause the need for urban
10 services. Similarly, Petitioner has not offered criteria or evidence that could help the Board
11 evaluate whether the cumulative effects of the exemptions are less effective at conserving
12 agricultural land and preventing sprawl than the lot aggregation requirements. While a map
13 shows the location of substandard lots, there is no evidence in the record of how the
14 exemptions affect the development of individual lots or groups of lots, the location of lots
15 affected by the exemptions, or evidence of environmental vulnerability or degradation that
16 show that development of lots in various locations will cause the need for urban services.
17
18
19

20 The County's solid agricultural conservation measures including large minimum lot sizes for
21 Agricultural and Forest Resource Lands, buffering requirements for lands adjacent to
22 agriculture, Right to Manage Resource Lands provision, and periodic notification to property
23 owners of adjacent agricultural activity help mitigate the effects of lots that will be developed
24 under this ordinance. Exhibits 1575, 632, 1578, 1085, SCC 14.38. Enforcement of the
25 County's code requirements for concurrency (SCC 14.28), flood damage prevention (SCC
26 14.34), drinking water systems (SCC 12.48), on-site sewage (SCC 12.05), shorelines
27 protections (SCC 14.26), and critical areas regulations (SCC14.24) helps mitigate the
28 environmental impacts and the need for urban services. The County also requires lot
29 certification to ensure substandard lots are legally platted. SCC 14.06.045. A certified lot
30 can be conveyed but it cannot be developed unless the property owner can comply with all
31
32

1 the other County development regulations, except minimum lot size. Additionally, the
2 County disallowed the development of substandard lots of less than an acre on Fidalgo
3 Island and Guemes Island until subarea plans for those areas are completed. SCC
4 14.16.850(4)(c)(viii)(A)
5

6
7 Development of substandard lots in Agricultural and Rural Lands continues to occur under
8 the County's requirement to aggregate contiguous lots under one ownership, as it will under
9 this new approach. Some substandard lots in these designations will not be allowed to
10 develop under both approaches. The Board has been given no evaluative tool to judge
11 which of the following is more effective in reducing substandard lots in Resource and Rural
12 Lands: (1) the requirement to aggregate substandard contiguous lots under one ownership,
13 which some property owners successfully had waived through innocent purchaser claims or
14 through Hearings Examiner decisions and which deters farmers from purchasing adjacent
15 lots for agricultural use; or (2) a regulation that offers a variety of exemptions to the
16 prohibition of development of a substandard lot. The lot aggregation requirement, which
17 effectiveness has been shown to be limited in reducing substandard lots in agricultural and
18 rural lands, was found to be compliant with RCW 36.70A020 (2) and (8). **Therefore,**
19 **because Petitioner has not given the Board a tool for evaluating the effectiveness of**
20 **these two measures, we are not persuaded that Ordinance 020040017's approach to**
21 **reducing substandard lots is less effective in reducing substandard lots in Resource**
22 **and Rural Lands than the County's current lot aggregation requirement, or is**
23 **noncompliant.**
24
25
26

27 **Transfer of Development Rights (TDR)**

28 Petitioner asserts that a transfer of development rights program would be more successful
29 in reducing substandard lots than either lot aggregation or Ordinance provisions, so the
30 Board should find these measures noncompliant and mandate the County to maintain
31
32

1 current lot aggregation requirements, until the County can adopt a transfer of development
2 rights program. FOSC Reply Memorandum (December 22, 2004) at 6.

3
4 At argument, the County pointed out letters from organizations advocating agricultural
5 conservation and from a county advisory group that express reservations about a TDR
6 program and concerns that a TDR will undermine their efforts to purchase substandard lots
7 to prevent their development.
8

9
10 No evidence is presented that convinces us that a TDR program will be any more effective
11 at reducing substandard lots in Rural and Resource Lands. In fact, letters from the Western
12 Washington Agricultural Association, Skagit County Conservation Futures Advisory
13 Committee, and FOSC, themselves, related their concerns to the County that evidence from
14 around the country showed limited TDR success in rural counties, where cities are
15 developed at low urban densities. Other concerns include the impacts of a TDR program on
16 the market values of agriculture land and a purchase of development rights program and the
17 costs of administering a TDR program. These groups encouraged the County to continue a
18 thorough study of TDR, but to weigh carefully how it would fit with other agricultural land
19 conservation programs. Exhibits 1546 (11), (12), and (14). While the Board hopes the
20 County continues to investigate the feasibility of a TDR program, we are not convinced that
21 this current approach established by Skagit County Ordinance should be found
22 noncompliant or that the lot aggregation regulation should remain in place until a TDR
23 program is adopted.
24
25

26
27 Pursuant to 36.70A.320(2) Petitioner has not sustained its burden of proving that the
28 Ordinance's approach to reducing substandard lots in Rural and Resource Lands is less
29 effective than a TDR program might be, or that the current lot aggregation ordinance should
30 be kept in place until such a program is in place.
31
32

1 **Concluding Remarks**

2 The Board has no illusions about the success of Ordinance 020040017 in reducing the
3 number of substandard lots. While the County may have done all it can or is willing to do
4 about limiting development of substandard lots in Rural and Resource Lands through a
5 mandatory regulatory approach for now, the work of conserving agriculture and preventing
6 sprawl should not be over. From our review of the record in this case, we cannot fail to be
7 impressed by the number and breadth of groups and individuals who care deeply about the
8 conservation of agricultural lands in Skagit County. Recognizing that the County has limited
9 resources and has already invested a great amount of time and resources complying with
10 the GMA, we nevertheless encourage the County to work with FOSC, other non-profit and
11 public entities, and with private organizations to produce the necessary data to monitor³ the
12 success of this approach, especially in areas known to have a multitude of one-acre or less
13 vacant lots, to improve its regulations and practices and to ensure the realization of the
14 fundamental GMA goals that this regulation seeks to address. In like manner, we also
15 encourage the parties to develop or enhance non regulatory programs, such as increasing
16 purchases of development rights of substandard lots for agricultural production, continuing
17 to explore the feasibility of TDRs, developing incentives for keeping land in agricultural use,
18 establishing marketing and educational programs, and exploring emerging innovative
19 techniques for enhancing agricultural conservation. The Board fully understands that
20 regulatory measures are just one piece of an effective, ongoing, comprehensive program to
21 conserve agricultural lands that both the County and FOSC value as one of Skagit County's
22 greatest assets.
23
24
25
26

27 **VI. FINDINGS OF FACT**

- 28 1. Skagit County is a county located west of the crest of the Cascade Mountains that is
29 required to plan pursuant to RCW 36.70A.040.
30

31

32 ³ The County solicited proposals for an inventory of substandard lots in Resource and Rural Lands, but found
the \$350,000 estimate too costly to pursue. Exhibit 1552.

2. Petitioner is an organization that offered written or oral comments to the County regarding the provisions challenged here during the adoption process.
3. The County had lot aggregation requirements in place when the Board found the County had adequate provisions to protect Natural Resource Lands from incompatible uses.
4. When the County eliminated its lot aggregation requirements, the Board found, in its February 6, 2001, order, that to achieve compliance, the County must adopt other measures that prevent incompatible development and uses from encroaching on resource lands and their long-term viability.
5. On October 19, 2004, Skagit County adopted Ordinance No. 020040017 for the purpose of complying with the Board's June 23, 2004, Final Decision and Order and earlier orders date February 6, 2001, and September 11, 2003.
6. The County has required a minimum lot size in NRL – Agricultural designations of 40 acres since 1979, and 30 acres from 1973 to 1979. Exhibits 632, 1575.
7. The County's conservation measures for agricultural land include a Right to Manage Resource Lands Ordinance, disclosure on deeds by landowners selling land within a mile of NRLs of the proximity to NRLS, and a 200-foot setback for development adjacent to NRLs. SCC 14.38
8. The County requires development on substandard lots to meet all the county's code requirements for concurrency (SCC 14.28), flood damage prevention (SCC 14.34), drinking water systems (SCC 12.48), on-site sewage (SCC 12.05), shorelines protections (SCC 14.26), and critical areas regulations (SCC14.24).
9. A letter in evidence from Skagitonians to Preserve Farmland states the County's requirement for the aggregation of contiguous substandard lots under one ownership deters farmers from acquiring adjacent lots for agricultural use because land loses a development right when an adjacent owner purchases it. Exhibit 1448 at 2 and 3.
10. Some contiguous lots under one ownership were allowed to develop either through favorable findings in Superior Court that recognized the subdivision law's innocent purchaser provisions or through variances granted by the Hearings Examiner. Exhibit 0473.
11. Attorney General Opinions (AGO) advise counties and cities that substandard lots do not have to be aggregated and that counties and cities planning under the GMA should consider "investment backed expectations" of property owners to avoid

regulatory takings, while formulating regulations to comply with the GMA. Appendix B and Exhibit 1553.

12. The County has a lot certification process to ensure lots are legally platted. Certified lots can be conveyed, but must meet all the other County development regulations except minimum lot size to be developed. SCC 14.05.045

13. The exemption to allow for the development of legal lots platted after 1965 was part of the County's lot aggregation requirements when the Board found the County's agricultural conservation measures compliant. Exhibits 1085 and 1034 Ordinance 20030001 at 14.04.190.

14. Property owners that have made binding financial commitments through participation in ULIDs and LIDs qualify for an exemption to the prohibition of development on NRLS and Rural Lands.

15. To install an on-site septic system or obtain an on-site system permit, a property owner must employ a designer or installer, who meets certain minimum requirements, to record soil, topography, and groundwater conditions and use specified procedures to certify the soil is appropriate for an on-site system. SCC 12.05.190. The County does not perform this work for a property owner. Exhibit 1582. This kind of investment qualifies as exemption from the prohibition of substandard lots in Skagit County's NRLS and Rural Lands.

16. Drilling a well qualifies a property owner exemption from the prohibition of development of substandard lots of NRLs and Rural Lands.

17. The Board determined the County's vesting provisions to be compliant in the Final Decision and Order issued in this case on February 6, 2001.

18. Remodeling an existing residence or commercial structure on a substandard lot in Rural and Resource Lands does not interfere with the conservation of NRLs or promote sprawl.

19. The County zoning ordinance provides for a variety of rural densities. SCC 14.16.300–14.16.370.

20. The County provides evidence that it requires a residence to be secondary to resource use in Industrial Forest Lands. Exhibit 1581.

21. The County has eliminated the more intense nonresidential uses from the allowed nonresidential uses on substandard lots in Rural Residential Zones.

- 1 22. The County does not allow the development of substandard lots in Agricultural - NRL
2 and lands that are registered in open space tax reduction programs that do not qualify
3 for other exemptions.
- 4 23. Agricultural use is a reasonable use in an Agricultural NRL.
- 5 24. The reasonable use exemption does not apply to lots that were in common ownership
6 before 1990 and could be aggregated.
- 7 25. Petitioner provides no evidence of how many lots are affected by exemptions, how
8 groups of lots are affected by the exemptions, and the location of lots affected by the
9 exemptions.
- 10 26. Petitioner provides no evidence of areas of environmental vulnerability or degradation
11 affected by the development allowed through the Ordinance's exemptions.
- 12 27. Letters from the Western Washington Agricultural Association, Skagit County
13 Conservation Futures Advisory Committee, and FOSC, themselves, relate their
14 concerns to the County that evidence from around the country showed limited TDR
15 success in rural counties, where cities are developed at low urban densities. Other
16 concerns included the impacts of a TDR program on the market values of agriculture
17 land and a purchase of development rights program and the costs of administering a
18 TDR program. Exhibits 1546 (11), (12), and (14).

21 VII. CONCLUSIONS OF LAW

- 22 A. Petitioner has not met its burden of proving, pursuant to RCW 36.70A.320 (2), that
23 adopted Ordinance No. 02040017 is less effective in preventing incompatible
24 development and uses from encroaching on resource lands and their long-term viability
25 than the County's current lot aggregation requirements.
- 26 B. Petitioner has not met its burden of proving, pursuant to RCW 36.70A. 320(2) that
27 measures adopted by Ordinance No. 02040017 are less capable of ensuring permissible
28 development of substandard lots does not allow development which would cumulatively
29 necessitate the provision of urban services in rural areas. Nor did Petitioners prove
30 Ordinance 020040017 would fail to reduce low-density sprawl in greater measure than
31 the County's current lot aggregation ordinance.
- 32 C. Petitioner has not met its burden of proving that Ordinance No. 02040017 does not
comply with the Growth Management Act (RCW 36.70A.020(1)(2) and(8) and RCW
36.70A.060.

ORDER

In accordance with the above Findings of Fact and Conclusions of Law, the Board determines that Ordinance NO. 020040017 COMPLIES with the Growth Management Act and is at least as effective as the County's current lot aggregation regulations in preventing substandard lots from interfering with agricultural lands and uses, and in preventing the cumulative effects of low-density sprawl and the need for urban services. Pursuant to RCW 36.70A.320 (3), we find that the County's regulations for reducing the number of substandard lots in Resource and Rural Lands now comply with the GMA. The issues regarding lot aggregation in Case No. 00-2-0046c are now DISMISSED.

The issue decided above is the last remaining issue in Case No. 00-2-0046c. Therefore Case No. 00-2-0046c is now CLOSED and the matters therein DISMISSED.

This is a final order for purposes of RCW 36.70A.300(5) and reconsideration pursuant to WAC 242-02-832. A motion for reconsideration must be brought within ten days of service of this final order.

So ordered this 19th day of May 2005.

Holly Gadbow, Board Member

Gayle Rothrock, Board Member